No. 711

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

G. D. THOMPSON, As Receiver of the Twin Falls National Bank, Twin Falls, Idaho,
Appellant,

vs

COMMON SCHOOL DISTRICT NO. 54, in the County of Twin Falls, State of Idaho,
Appellee.

G. D. THOMPSON, As Receiver of the Twin Falls National Bank, Twin Falls, Idaho,
Appellant,

vs.

COMMON SCHOOL DISTRICTS NOS. 32, 36, 47, 59, and 62, in Twin Falls, County, State of Idaho,
Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

MARLIN J. SWEELEY,
EVERETT M. SWEELEY,
Solicitors for Appellees,
Residence: Twin Falls, Idaho

FRANK L. STEPHAN,
J. H. BLANDFORD,
Solicitors for Appellant,
Residence: Twin Falls, Idaho.

FILED

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INDEX TO SUBJECTS

TABLE OF AUTHORITIES

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STATEMENT

Because a number of school districts are united as plaintiffs in Case No. 1787 in which the pleadings are set forth in full in the Transcript, we have thought it best to clarify the situation by stating that the several districts and their claims were thus combined in a single suit through agreement of the parties in order that labor and expense might be saved. Particular attention is called to the fact

that, although the claims of the various Districts are similar, they are not all identical, and no one depends on or is controlled by another, but each should be passed upon and determined separately. To effect a like saving the pleadings in Case No. 1729 in the District Court are omitted from the record herein.

We deem it also important to have it set forth in the statement of facts that as shown by stipulation (Tr. p. 100) the Twin Falls National Bank at all times from and including the time which ante-dates all of the transactions in question, up to and including November 23rd, 1931, "had cash on hand in an amount sufficient to pay in full the claims of the plaintiffs in suit herein, and to pay also in full the claim of plaintiff in suit in case numbered 1729 in the above named Court and that on the date last stated, being the date when said Bank became insolvent and ceased doing business, it had cash on hand in the amount of $7,247.74." and that on the date last mentioned it "had to its credit in its account in said Federal Reserve Bank approximately $5000." (Tr. 116).

The statement of counsel for appellant at page 6 of their brief that "No part of the proceeds of the seven checks drawn by the county treasurer and delivered to the Twin Falls National Bank ever came into the hands of the Receiver of said Bank," cannot be accepted either as a statement of fact or a conclusion of law. The claim, so made, that no part of the proceeds of the checks referred to ever came into the custody or possession of the Bank is fully controverted and its error proven by the record herein which shows by Exhibits A, B, C, D and E,

being copies of judgments entered by the State Court in favor of these Districts in suits to recover from the Bank the money unlawfully taken from them, that the proceeds of the checks came into the possession of the Bank. (Tr. 48 to 63 inc.). More than this, in his answer to the Bill of Appellees Tr. 67, 72, 77,, 87, 88, 92) the appellant admits that these suits were commenced and that judgments were entered therein against the Bank as alleged.

That portion of the statement complained of, that no part of the proceeds of the checks ever came into the hands of the receiver of the Bank, is not admitted by appellees, that being one of the principal questions in these cases, and perhaps the controlling question, to be passed upon by this Court.

POINTS AND AUTHORITIES

First. The funds of the School Districts, named as plaintiffs in the two actions brought here on appeal, were withdrawn from their treasury upon warrants issued to the Bank which were based on forged orders. Being thus wrongfully taken they became trust funds in the hands of the Bank.

Transcript, page 117.
Appellant's Brief, pp. 4, 6.
San Diego County vs. California National Bank, 32 Fed. 59.
Merchants National Bank vs. School District, 94 Fed., 705.
Ind. Dist. vs. King, 80 Ia., 497; 45 NW, 908.
Board vs. Patterson, 149 Fed., 229.

Second. That the Twin Falls National Bank be-

came liable to the School Districts for the money taken from their treasury was settled in the cases of

> Common School District No. 27 vs. Twin Falls National Bank, 50 Ida., 668; 299 Pac. 662, and
> Common School District No. 61 vs. Twin Falls Bank & Trust Company, 50 Ida., 711; 4 Pac. (2nd), 342.

involving like questions, and also by the judgments entered against the Bank in favor of the several districts by the Idaho State Court, evidenced by the exhibits attached to Appellees' Bill herein. (Tr. pp. 48 to 63).

Third. The moneys so wrongfully taken from each of the several school trustees, as between the District and the Bank, became a trust fund held by the Bank as trustee, and the district was,, and is, entitled to recover it as a preferred claim for (a) it was commingled with other moneys and credits of the Bank; (b) the Bank at all times had on hand cash in an amount sufficient to pay in full the claims of all the appellees; and, (c) at the time of the failure of the Bank it had on hand cash in the sum of $7,247.74, (Tr. 100), which went into the hands of the receiver, being more than the aggregate of the claims of appellees.

Fourth. Where money held in trust is by the trustee mingled with funds of his own so that its

identity is lost the entire property is impressed with the trust.

Frelinghuysen vs. Nugent 36 Fed. 229.
Beard vs. Ind. Dist., 88 Fed., 375.
Merchants Nat. Bank vs. School District, 94 Fed., 705.
Board vs. Patterson, 149 Fed., 229.
Smith vs. Mottley 150 Fed., 266.
Board vs. Strawn, Receiver, 157 Fed., 49.
Allen vs. U. S. 285 Fed., 678.
Am. Surety Co., vs. Jackson, 24 Fed. (2nd), 768.
National Bank vs. Insurance Co., 104 U. S., 54; 26 Law Ed., 693.
Peters vs. Bain, 133 U. S., 670, (704); 33 Law Ed., 696.
First National Bank vs. Fidelity & Dep. Co., 48 Fed (2nd), 585.
Trestrail vs. Johnson, 298 Pa., 388; 148 Atl., 493.
Tooele County Board vs. Hadlock, 11 Pac. (2nd), 320. (Utah).

Fifth. It is presumed that where a trustee pays out money from a fund made up of his own and that belonging to the trust, such payments are from his own and that the portion remaining belongs to the trust.

Standard Oil Co. vs. Hawkins, 74 Fed., 395.
Merchants National Bank vs. School District, 94 Fed., 705.

Board etc. vs. Strawn, Receiver, 157 Fed., 49; 15 L. R. A. (N. S.) 1100.
Macy vs. Roedenbeck 227 Fed., 346.
Allen vs. U. S. 285 Fed. (C. C. A.) 678.
Skinner vs. Porter 45 Ida. 530; 263 Pac. 993.
Waddell vs. Waddell 36 Utah, 435; 104 Pac. 743.
Woodhouse vs. Crandall, Receiver, 197 Ills., 104; 64 NE. 292.
Blythe vs. Kujawa, 60 A. L. R., 330; 220 NW, (Minn.).
Ind. School District vs. King, 80 Iowa, 497; 45 NW, 908.
State vs. Bank of Commerce 54 Nebr. 725; 75 NW, 28.

Sixth. Interest at the legal rate is to be charged to the trustee of the trust fund from the time of its receipt up to the time an accounting is demanded.

Idaho Code Annotated, Section 26-1904.
15 R. C. L., Page 10, Sec. 8.
Luke vs. Kettenbach, 32 Ida., 192; 181 Pac., 705.
In Re Seward, 37 A. L. R., 441. (Notes to, beginning at page 459).
Same case in 105 Nebr., 787; 181 Pac., 941).
In Re Reed, 55 A. L. R. 941; 259 Pac. (Wyo.) 815.

Seventh. The Court costs in all of the suits brought by the school districts against the Bank, in which the judgments were entered, were all incur-

red before the insolvency of the Bank and are properly a part of the several claaims.

These costs were made necessary by sections 3702, 3704 and 3712 of Idaho Compiled Statutes.

ARGUMENT

If we understand their position correctly, counsel for appellant are relying on the assumption that **the money** of the School Districts did not come into the hands of the Receiver, and hence that the appellees are not entitled to a preference in the payment of their claims. Apparently their contention is that **the money** of the School Districts was all dissipated before the Bank failed, leaving nothing to which a trust could attach.

When it is borne in mind that in this action we are not dealing with any **specific property**, that no actual cash in the way of national currency, national bank bills, Federal Reserve notes, gold or silver certificates, gold or silver coin, was or is involved, but that, as in nearly all financial transactions of today, the case features **credits**, it will be seen that the position of the appellant is not sound.

The appellees say, and the undisputed facts are that no actual cash in specific kinds of money belonging to them was taken or converted by the Bank, but that their funds were by the Bank depleted, their credit balances reduced. It is our contention, and we think it is sustained by both reason and authority, that when the Bank took from the County Treasurer, acting as the Treasurer of the

School Districts, checks in payment of the warrants based on orders admitted to have been fraudulent, and mingled the money thus obtained with its own funds, as it did, so that its identity was lost, the entire assets of the Bank, of whatsoever kind, wherever situated, and however held, were then impressed with a trust in favor of the appellees. Thereafter it was the duty of the Bank to so handle its money and property as to have on hand an amount from which the claims of the School Districts could be paid.

Counsel for appellees do not deem it necessary or expedient to encumber the pages of this brief, or impose on the Court what to them seems to be unnecessary work, by multiplying cases in which the points they have suggested have been many times passed upon, as shown by the authorities listed. They do not consider it an open question as to whether the funds of the School District taken from them without warrant of law, became trust funds in the hands of the Bank, or that proof to that end, by specific reference to the authorities or the making of quotations therefrom is called for, but pass directly to the obligation of the Bank in regard to those funds. In our opinion the law relating to the facts applicable to the several claims in suit in these two cases is set forth succinctly in the opinion of the Court in the case of

Board, etc. vs. Patterson, 149 Fed. 229,

as follows:

> "We discover that in the first place identification of a trust fund is complete where moneys

are found in the hands of the trustee who has mingled his own funds with the trust fund, and that the remaining fund, if not in excess of the trust fund will be deemed to be that portion of the trust fund which the trustee has not touched, because belonging to the trust; and in the second place, that if the trust fund has been mingled with the body of the trustee's estate, and the trust fund or any part of it has been converted into other specific forms of property which can be discovereed and followed, and which passed into the hands of the assignee, receiver or trustee, that property will be turned over to the beneficiary of the trust, or, if the trust fund has been mingled with the funds of the trustee and has been invested along with the trust fund in assets which have come into the hands of the receiver or assignee, then the trust fund is made a charge against the entire mass of the assets in the acquisition of which the trust fund, together with the other property of the trustee, was used."

Another case in which the rule for which we are contending is announced is that of

Macy vs. Roedenbeck (C. C. A.) 227 Fed. 346.

In that case the Court stated the law to be:

"Where a trustee mingles funds and makes payment out of the common fund, there is a sufficient identification of the remainder, not exceeding the smallest amount the fund contained

subsequent to the commingling, because the legal presumption is that he regarded the law and neither paid out nor invested in other securities or property the trust fund, but kept it sacred."

The case of

Allen Bank Commissioner vs. U. S., 285 Fed. 678 (C. C. A. for 1st Circuit),

was one in which a bank had received a deposit of money that could not lawfully be made. The Bank at all times had cash on hand in excess of the deposit. The Court held that the cash that passed into the hands of the Receiver was impressed with a trust in favor of the rightful owner of the deposit, being the United States. In its opinion the Court said:

"As to the other deposits, it is agreed that the trust company had on hand at all times after said money was deposited and when possession was taken by the Commissioner, cash assets in its commercial department exceeding the amount of both of said accounts. Under these admitted facts it is a presumption of law that the trust fund is included in the cash assets in its commercial department, and has never been wrongfully appropriated."

"While the burden is upon the beneficiary to trace the trust fund, we think under the circumstances in this case it has been done, and that the cash effects in the commercial depart-

ment of the trust company which have come into the possession of the Commissioner are impressed with a trust in favor of the United States for the full amount of $12,520.79."

In the case of Trestrail vs. Johnson, 148 Atl. 403; 298 Pa. 388,

the Court announced the law to be as follows:

"Where trust funds are mingled with personal funds under an account designed as a trust fund account, the entire mass will be considered as trust funds until the demands of the trust are satisfied. When dollars are traced into an account, the identical dollars need not be located. Where the agent has mingled his own property with that of the principal, the latter may claim from the admixture an amount equal to his own, although it may not be the same identical property."

In the case of

American Surety Co. vs. Jackson, 24 Fed. (2nd) 768,

the Court said:

"In Smith vs. Mottley, 150 Fed. 266, the Circuit Court of Appeals for the 6th District held that the burden of showing that his property had been wrongfully mingled with the mass of property of the wrongdoer was on the owner who sought to follow it, and when this was done

the burden shifts to the wrongdoer to show that the money or property has passed out of his hands, and that his trustee in bankruptcy stood in the same position."

"This was reaffirmed in Board of Commissioners vs. Strong, 157 Fed. 49. It will thus be seen that the rule itself rests largely on a legal fiction. But if there is a presumption that trust funds have not been wrongfully misapplied or criminally used by the officers of the bank, as held by this court in the Spokane County case, **supra,** and such a presumption no doubt obtains, it would seem to follow as a necessary correllary that the burden was on the bank or its successor in interest to prove that the trust funds, or some of them, were in fact wrongfully misappropriated or criminally used by the bank."

Concerning the right to follow a trust fund where it had become commingled with other money or property the Supreme Court of the United States in the case of

Central National Bank of Baltimore, vs. Connecticut Mutual Life Ins. Co., 104 U. S., 5, (26 Law Ed., 693).

held:

"That so long as trust property can be traced and followed into other property into which it has been converted, the latter remains subject to the trust, and that if a man mixes trust

> funds with his own the whole will be treated as the trust property except so far as he may be able to distinguish what is his own, are established principles of equity and apply in every case of a trust relation, and to moneys deposited in a bank account and the debt thereby created, as well as to every other description of property."

In the case of:

Peters vs. Bain, 133 U. S. 670, (33 Law Ed., 704), the Supreme Court quotes, with evident approval, a holding of a Federal Court, as follows:

> "It was said by Mr. Justice Bradley in Frelinghuysen v. Nugent , 36 Fed. Rep. 229, 239: 'Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it, the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase or sale. But if it became confused with other property of the same kind so as not to be distinguishable without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority right over the other creditors of the possessor."

We believe the law to be well settled in both Federal and State courts that where trust funds are by the trustee mingled with those of his own so that their identity is lost the whole fund is impressed with the trust, and upon that assumption contend that upon the facts relating to the several claims in suit herein each of the claimants is entitled to the relief asked for and to that end that the orders and judgments of the District court should be affirmed. In support of that contention we apply the law to the facts which are not disputed.

The beginning of all of the claims of the appellees in both cases are alike. They grew out of the purchase by the Bank of what purported to be orders of the Districts for warrants, but which proved to be forgeries.

AS TO THE FIRST CLAIM OF DISTRICT NO. 32.

The purported order was in the amount of $160. It was by the Bank presented to the county treasurer and that official drew and delivered to the Bank a check on the First National Bank of Twin Falls in the amount of $575.25 "for the payment and redemption of said $160 warrant and other warrants." (Tr. 102).

The check so received was by the Bank "cleared together with other checks and items, with said First National Bank and said First National Bank in settlement of the difference or balance of the clearings drew a draft upon the National Copper Bank of Salt Lake City, Utah, for the sum of $774.04 payable to the Twin Falls National Bank and delivered said draft to

said Twin Falls National Bank. That said Twin Falls National Bank forwarded said check to the Federal Reserve Bank at Salt Lake City and said Federal Reserve Bank collected said draft from said National Copper Bank and thereupon gave Twin Falls National Bank credit for said sum * * *."

There were thus three comminglings of the fund of $190 belonging to the School District with the funds of the Banks; first, in the check for $575.25 issued in redemption of the $190 "and other warrants"; second, in the settlement of the clearing house difference by the taking of a draft on a Salt Lake City Bank in the amount of $774.04; and, third, in receiving with its Salt Lake correspondent credit for the amount of that draft. Either was sufficient to completely destroy the identity of the funds of the School District. At all times after these transactions until the failure of the Bank, during a period of two years, the Bank had on hand in cash enough to pay in full all of the claims of the several District, and when it closed its door had in cash $7247.74, and with its Salt Lake correspondent "approximately $5000." There should be no question that this claim is entitled to a preference.

AS TO THE SECOND CLAIM OF DISTRICT NO. 32.

The purported order was in the amount of $212. (At pages 69, 70 71 and 72 of the Transcript the amount appears as $112. At pages 51 and 104 of the Transcript it is given as being $212, and at page 4 of the brief of counsel for appellant it is listed, correctly, as $212).

It was by the Bank presented to the county treasurer who drew and delivered to the Bank a check in the amount of $502, in payment of an order for $212 and another in the amount of $290, payable to the Bank.

The $502 check was by said Twin Falls National Bank cleared, "together with other checks and items with the Twin Falls Bank & Trust Company and said Twin Falls Bank & Trust Company in settlement of the difference or balance of the clearings drew a draft on the Walker Bank & Trust Company of Salt Lake City, Utah, for the sum of $2203.10, payable to the Twin Falls National Bank and delivered said draft to the said Twin Falls National Bank. That said Twin Falls National Bank forwarded said draft to the Federal Reserve Bank at Salt Lake City and said Federal Reserve Bank collected said draft from the Walker Bank & Trust Company and thereupon gave said Twin Falls National Bank credit for said sum, * *." (Tr. 104).

The other order, being one for $290 which was combined with the one for $212 mentioned above, making the $502 for which the check was given, purported to have been issued by School District No. 54. There was thus a commingling of two trust funds and two comminglings of these funds with those of the Bank, first, by the taking from the Twin Falls Bank & Trust Company in settlement of the clearing house operations of the draft for $2203.10, and, second, by receiving with its Salt Lake correspondent credit for the amount of that draft. The order and judgment of the District Court giving the sec-

ond claim of District No. 32 a preference is right and should be affirmed.

AS TO THE CLAIM OF SCHOOL DISTRICT NO. 36.

The purported order was in the amount of $160.00. It was by the Bank presented to the county auditor who issued to the Bank a warrant for $269.08, including "another order or other orders," for $107.78. The Bank then presented said warrant to the county treasurer and from that official obtained a check upon the Twin Falls Bank & Trust Compaany for $267.78 The Twin Falls National Bank cleared that check "together with other checks and items, with the Twin Falls Bank & Trust Company and said Twin Falls National Bank, in settlement of the difference or balance of the clearings drew a draft on the Continental National Bank of Salt Lake City for the sum of $1311.98, payable to the Twin Falls Bank & Trust Company which draft was thereafter and in due course collected by said Twin Falls Bank & Trust Company." (Tr. 106, 107). The identity of the funds of the School District was not only lost through their being commingled with the funds of the Bank in the check received by the Bank from the county treasurer, which of itself entitled the District to the preference allowed it by the District Court but there is nothing in the record to show that the funds of the District were made use of in the issuance or payment of the draft drawn on the Salt Lake bank. In the absence of such a showing the presumtion controls that the school district's fund remained on hand.

AS TO THE CLAIM OF SCHOOL DISTRICT NO. 47.

The purported order was in the amount of $225. It was by the Bank presented to the County Auditor who issued to the Bank a warrant for the payment of the order "and another order or orders for warrants." The Bank presented the warrant to the county treasurer who issued to the Bank a check on the Twin Falls Bank & Trust Company in the amount of $500 "which was for the payment and redemption of said above described warrant."

The Twin Falls National Bank cleared said $500 check, together with other checks and items, with said Twin Falls Bank & Trust Company and said Twin Falls National Bank in settlement of the difference or balance of the clearings drew a draft upon Continental National Bank of Salt Lake City, Utah, for $3917.52 payable to the Twin Falls Bank & Trust Company and delivered said draft to said Twin Falls Bank & Trust Company and said Twin Falls Bank & Trust Company thereafter in due course collected the same." (Tr. 108, 109).

The identity of the funds of the School district was not only lost through their being commingled with the funds of the Bank in the check received by the Bank from the treasurer, which of itself entitled it to the preference allowed it by the District Court, but there is nothing in the Record to show that the funds of the District were made use of in the issuance or payment of the draft drawn on the Salt Lake bank. In the absence of such a showing the presumption controls that the school district's funds remained on hand.

AS TO THE CLAIM OF SCHOOL DISTRICT NO. 59.

The purported order was in the amount of $225. A warrant issued for that sum and a check on the First National Bank of Twin Falls in payment for the same amount was by the treasurer given to the Bank. The Bank cleared the check, "together with other checks and items with said First National Bank and said Twin Falls National Bank in settlement of the difference or balance of the clearings drew a draft upon the Continental National Bank of Salt Lake City, Utah, for the sum of $559.25, payable to said First National Bank and delivered said draft to said First National Bank and said First National Bank thereafter in due course collected the same."

The record does not show that the funds of the school district were made use of in the issuance or payment of the draft drawn on the Salt Lake Bank, and in the absence of such a showing the presumption controls that the school district's money remained on hand.

AS TO THE FIRST CLAIM OF SCHOOL DISTRICT NO. 62

The purported order was in the amount of $100. It was by the Bank presented to the county auditor who issued to the Bank a warrant in payment of the order "and another order or orders for warrants." The treasurer gave to the Bank a check on the Twin Falls Bank & Trust Company in the amount of $151.69 "for the payment and redemption of said above described warrant." The Twin Falls National Bank "cleared said $151.69 check together with

other checks and items with said Twin Falls Bank & Trust Company and said Twin Falls National Bank in settlement of the difference or balance of the clearings drew a draft upon the Continental National Bank of Salt Lake City, Utah, for the sum of $4024.00, payable to said Twin Falls Bank & Trust Company, and said Twin Falls Bank & Trust Company thereafter in due course collected the draft."

The identity of the funds of the school district were not only lost by being commingled with the funds of the Bank in the check received by the Bank from the county treasurer, which of itself entitled it to the preference given it by the District Court, but there is nothing in the record to show that the funds of the District were made use of in the issuance or payment of the draft drawn on the Salt Lake Bank. In the absence of such a showing the presumption controls that the funds of the school district remained on hand.

AS TO THE SECOND CLAIM OF SCHOOL DISTRICT NO. 62.

The purported order was in the amount of $240. The Bank caused the county auditor to issue to it a warrant for the payment of that order "and another order or orders," and thereafter presented said warrant to the treasurer and from that official received a check on the First National Bank of Twin Falls for the sum of $570, payable to said Twin Falls National Bank in payment of said warrant.

The Twin Falls National Bank cleared said $570 check, "together with other checks and items with said First National Bank and said First National

Bank in settlement of the difference of balance of the clearings draw a draft on the National Copper Bank of Salt Lake City, Utah, for the sum of $656.90, payable to the Twin Falls National Bank. That the Twin Falls National Bank forwarded said draft to the Federal Reserve Bank, at Salt Lake City and said Federal Reserve Bank collected said draft from the National Copper Bank and thereupon gave said Twin Falls National Bank credit for said sum * * ." (Tr. 114, 115).

There were three comminglings of the fund of $240 belonging to the school district with the funds of the Bank; first, in the check for $570 issued in redemption of the $240 "and other warrants" second in the settlement of the clearing house difference by the taking of a draft on the Salt Lake City bank in the amount of $656.90; and, third, in receiving with its Salt Lake correspondent credit for the amount of that draft. Either was sufficient to completely destroy the identity of the funds of the school district, and entitles it to the preference in payment ordered by the District Court.

AS TO THE CLAIM OF SCHOOL DISTRICT NO. 54 (IN CASE NO. 1729).

The purported order was in the amount of $290. It was combined with one for $212, purporting to have been issued by District No. 32, (heretofore mentioned), making a total of $502 for which the Bank obtained a warrant from the county auditor. The Bank presented that warrant to the county treasurer and from that official received a check on the Twin Falls Bank & Trust Company for $502.

That check was cleared with the Twin Falls Bank & Trust Company and in the settlement the Twin Falls National Bank received from the Twin Falls Bank & Trust Company a draft on the Walker Bank & Trust Company of Salt Lake City, in the amount of $2203.10, payable to the Twin Falls National Bank. That draft was collected by the Federal Reserve Bank of Salt Lake City and by that bank its amount was credited to the Twin Falls National Bank. (Tr. 120, 104).

The other order, being the one for $212, which was combined with this one, making $502 for which the warrant was given, purported to have been issued by school district No. 32, as stated in connection with the second claim of that district. There was thus a commingling of two trust funds and two comminglings of these funds with those of the Bank. First, by the taking from the Twin Falls Bank & Trust Company in the settlement of the clearing house operations, of the draft for $2203.10, and, second by receiving with its Salt Lake City correspondent credit for the amount of the draft. The order and judgment of the District Court giving the second claim of District No. 62 a preference is right and should be affirmed.

AS TO THE QUESTION OF INTEREST

Appellant contends that interest on the claims of the school districts should not be allowed. That the Bank should be held for interest at the legal rate (being 7 per cent in Idaho) from the time the funds were taken by it up to the date of its insolvency, is sustained by authorities. The Idaho statute is

"When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of seven cents on the hundred by the year on * * *

"5. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied."

Idaho Code Annotated, Section 26-1904.

"Interest on a trust fund is recoverable where the money claimed has actually been used or is improperly retained by the trustee."

15 R. C. L., Page 10, Sec. 8.

"Where a guardian mingles his ward's funds with his own, and it is not shown that he received any profit from the use of the ward's funds, the guardian should be charged with interest at the legal rate with annual rests, on the amount of the funds of the ward so mingled with his own."

Luke vs. Kettenbach, 32 Ida., 192; 181 Pac. 705.

"Practically the same situation exists in case of a mingling of trust funds as in case of failure to invest. There is an inclination shown in a large number of cases to charge the guardian or other trustee who has mingled the trust funds with his own, or has used such funds in his private affairs, with the legal rate where it is not

shown a larger profit was realized therefrom."

Note to:

In Re Seward, 37 A. L. R. 441 (p. 459). Same case reported in 105 Neb. 787; 181 Pac. 941).

"In Perry on Trusts, Vol 1, Sections 468, he there summarizes the rule applying in the United States as follows:

> " 'If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, or deposits it in bank in his own name or in the name of the firm of which he is a member, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so, he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreement. * * * If the trustee cannot show what amount of interest he has received, he shall be charged with legal interest from the time when the regular investment ought to have been made.'
>
> "The cases on the subject are collected in a note in 37 A. L. R. 359, 465, and clearly show that the executor in this case cannot be charged with less than the legal rate as above mentioned."

In Re Read, 55 A. L. R. 941; 259 Pac. (Wyo.) 815.

The principal business of a bank is the loaning of money and the charging of interest and there would appear to be no reason why it should be allowed to obtain money, illegally, from another and not account for at least the legal rate of interest.

The school districts, by their claims filed with the receiver, are not asking for interest for the time elapsing from the time the judgments were entered in their favor against the Bank, which was December 8th, 1931. The Bank closed its doors on November 21st of that year. Upon consideration we do not believe that interest on the claims for the intervening period, being 17 days, is properly chargeable, and on behalf of the districts give consent to the making of that reduction, but contend that aside from that small allowance the several claims are correct as filed.

AS TO THE MATTER OF THE JUDGMENTS ENTERED BY THE STATE COURT AND THE COSTS INCLUDED THEREIN.

Counsel for appellant call attention to the showing that judgments were entered by the State Court against the Bank in favor of the School Districts on their claims for the money taken from them by the Bank, and urge that by that course they so changed the character of their claims as to lose their right to have them preferred.

It will be noted that the suits which resulted in the judgments were commenced prior to the insolvency of the bank, while it was a going concern, so that

the question of preference was not in any manner involved or of any importance. Those suits were not brought to recover any specific property, or to get back the identical money obtained by the Bank, but to recover what had been taken, **in amount, not in character.** All they did was to make certain what the Bank was denying—its liability to the districts for any indebtedness for what it had done.

It is also urged on behalf of the appellant that the costs included in the judgments so entered should not be allowed in a claim for preference. As stated, these suits were brought while the Bank was solvent, to determine the liability of the Bank to the districts, which it was denying. To institute those suits the districts were compelled to advance to the clerk of the court, in each case, fees aggregating $10, (Idaho Compiled Statutes, Sections 3702, 3713), and to the officer for serving summons, $1.40. (Idaho Compiled Statutes, 3704).

These claims, as to principal, costs, and interest up to Nov. 21, 1931, that being the day the Bank became insolvent and when the Receiver took charge, were legal and valid charges against the Bank growing out of its handling of the trust funds belonging to the school districts.

In the matters mentioned in their pleadings in the two suits set forth in the record herein the several school districts were entirely free of blame and we feel that they are entitled to the relief asked for by

them and as given by the orders and judgment of the District Court.

Respectfuly submitted,
MARLIN J. SWEELEY,
EVERETT M. SWEELEY,
(SWEELEY & SWEELEY)
Attorneys for Appellees,
Residence and Office,
Twin Falls, Idaho.

Service of the foregoing Brief of Appellees acknowledged by receipt of a true and correct copy thereof, this.....day of May, 1933.

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Attorneys for Appellant,
Residence and Office,
Twin Falls, Idaho.